United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1847

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P/S

To be argued by
LAWRENCE S. FELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1847

UNITED STATES OF AMERICA,
Appellee,

—v.—

DEMETRIOS PAPADAKIS and JOSEPH NOVOA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America

LAWRENCE S. FELD,
Assistant United States Attorney, Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Demetrios Papadakis and Joseph Novoa appeal from judgments of conviction entered on June 14 and July 2, 1974 in the United States District Court for the Southern District of New York, after a 13 day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 74 Cr. 229, filed on March 8, 1974, charged Joseph Novoa and Peter Daly in Count One with conspiracy (1) to defraud the United States by obstructing and hindering federal law enforcement agencies in the investigation and prosecution of violations of the federal narcotics laws; (2) to violate Title 21, United States Code, Sections 173 and 174; (3) to violate Title 18, United States Code, Section 3 and (4) to violate Title 18, United States Code, Section 1510, in violation of Title 18, United States Code, Section 371.

Counts Two and Three charged Daly and Novoa with substantive violations of Title 18, United States Code, Sections 3 and 1510, respectively. Count Four charged Daly, Novoa, Frank Ramos, Demetrios Papadakis, a/k/a "Jimmy Pappas", a/k/a "Jimmy the Greek", Joaquin Nieves and Elissa Possas with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Sections 173 and 174. Count Five charged Daly and Novoa with receiving 5 kilograms of heroin and cocaine on April 15, 1970 in violation of Title 21, United States Code, Sections 173 and 174. Counts Six and Seven charged Daly, Novoa, Ramos, Papadakis and Possas with the purchase and sale of 1 kilogram of heroin on two occasions in May or June, 1970 in violation of Title 21, United States Code, Sections 173 and 174. Count Eight charged Daly, Novoa, Ramos and Nieves with the purchase and sale of 1 kilogram of heroin in May or June, 1970 in violation of Title 21, United States Code, Sections 173 and 174. Counts Nine and Ten charged Daly, Novoa and Ramos with the purchase and sale of 1 kilogram of cocaine on two occasions in May or June, 1970 in violation of Title 21, United States Code, Sections 173 and 174.

Trial commenced on May 15, 1974 as to Novoa, Papadakis and Nieves.* Judge Wyatt granted a judgment of acquittal as to Papadakis and Nieves on Count Four at the conclusion of the case. Upon the Government's motion, Counts Two and Three as to Novoa were severed before the case was submitted to the jury. The jury found Novoa guilty on all eight counts submitted for their determination, Counts One and Four through Ten. Papadakis was found

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* Daly and Possas have been fugitives since the filing of the indictment. Ramos, a Government witness at trial, entered a guilty plea on May 15, 1974 to a superseding information charging him with conspiracy to purchase and sell narcotic drugs not in or from the original stamped package in violation of 26 U.S.C. § 4704(a).

guilty on Count Seven and was acquitted on Count Six. Nieves was acquitted on Count Eight, the remaining count against him.

On June 14, 1974 Judge Wyatt sentenced Papadakis to a term of five years imprisonment on Count Seven to run concurrently with the consecutive five year terms of imprisonment which he is presently serving for prior violations of the federal narcotics laws. On July 2, 1974 Judge Wyatt sentenced Novoa to a five year term of imprisonment on Count One to run concurrently with concurrent terms of ten years imprisonment on Counts Four through Ten.

Judge Wyatt denied Novoa's application for bail pending appeal, and that decision was affirmed by this Court on August 13, 1974. Both defendants are presently serving their sentences.

Statement of Facts

The Government's Case

1. Introduction

The investigation and prosecution of this case exposed a sordid pattern of criminal activity and corruption among certain police officers assigned to the Special Investigations Unit ("SIU") of the Narcotics Bureau of the New York City Police Department during 1969 and 1970. Appellant Joseph Novoa, fugitive defendant Peter Daly and co-conspirator Carl Aguiluz were three detectives who comprised one of the teams within SIU which was charged with the responsibility of investigating major narcotics violators operating in New York City. The evidence established that during 1969 and 1970, Novoa, Daly and Aguiluz, together and on some occasions with other SIU officers, committed a multitude of serious criminal offenses, including the sale of narcotics, the theft of money and narcotics seized as evi-

dence from arrested narcotics dealers, bribery, perjury, illegal wiretapping, planting false evidence on arrested persons and obstruction of justice. The proof showed that these acts were part of a conspiratorial agreement and pattern of conduct which not only impaired the fair and proper administration of the criminal justice system, but also specifically impeded efforts of federal investigators to gather evidence during an important investigation into the importation of narcotics from South America.

Appellant Demetrios Papadakis was one of the persons who bought a large quantity of narcotics from a batch of drugs stolen by Novoa, Daly and Aguiluz on April 15, 1970 from a massive seizure of heroin and cocaine and later sold by them through co-conspirator Salvador Boutureira and co-defendant Frank Ramos.

2. The "100 Kilo Case"

A. The Arrests

On April 14, 1970 at approximately 10:00 P.M., Novoa, Daly and Aguiluz, while conducting surveillance in the vicinity of Seventh Avenue and 14th Street in Manhattan, observed a white Galaxy Ford bearing Florida license plates proceeding south on Seventh Avenue. Inside the car were three men and a woman who were later identified as Emilio Diaz Gonzalez, a/k/a "Alfred Picardo", Jose Luis Mulas, Jorge Rodriguez Arraya and Elena Risso, a/k/a "Yolando Sarmiento." Two of the individuals left the car and entered a restaurant on 14th Street, where they remained briefly. After leaving the restaurant and reentering the car, all four drove to a delicatessen near Grove Street and Seventh Avenue. Two of the individuals entered the delicatessen and were followed inside by Novoa, who overheard part of their conversation. As a result, the three detectives decided to continue surveillance and followed the four suspects as they drove north on the West Side High-

way and over the George Washington Bridge to the vicinity of Fort Lee, New Jersey (Tr. 461-66).*

When it became apparent that the suspects had realized they were being followed, the detectives stopped their car near the Toll Gate Motel in Fort Lee and asked them to identify themselves. Shortly thereafter local police officers arrived and inquired about what was going on. When the detectives identified themselves and advised these Fort Lee police officers that they had followed the four suspects from New York, the local police departed. The detectives and the suspects then proceeded to the motel parking lot. The motel owner informed the detectives that the occupants of the car were staying at the motel. After Novoa and Aguilus checked various motel rooms in an unsuccessful effort to locate the suspects' room, they returned to the suspects and drove back with them to New York in their car followed by Detective Daly in his car (Tr. 467-68).

In the car Gonzalez told Aguiluz that he lived on West 18th Street in Manhattan. After some futile efforts to locate his apartment, Novoa and Aguiluz again asked Gonzalez to produce his identification papers. Gonzalez handed Aguiluz a portfolio containing three different passports, each bearing his photograph but issued by different countries to different named persons. Aguiluz then placed Gonzalez under arrest for falsifying an official document (Tr. 468-69).

After Gonzalez had been arrested, Aguiluz told Novoa and Daly that he doubted whether the arrest was valid. Daly then winked at Aguiluz and said there was a gun underneath the front seat of the suspects' car. All four

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* "Tr." refers to the transcript of the trial; "GX" denotes Government exhibits admitted in evidence; "DX" denotes defense exhibits in evidence; references followed by the letter "a" are to Novoa's appendix; "Br." refers to the brief of the specified appellant.

suspects were then placed under arrest and brought to the Sixth Precinct Station house located near Hudson and Charles Streets. There everyone proceeded to the Detectives' Squad Room where Elena Risso was separated from the three men, who were placed in a cell (Tr. 470-71).

While the prisoners were being processed, Gonzalez called Aguiluz over to his cell and accused Aguiluz of having stolen $100 from him. In response to Aguiluz' request to show him in which of his papers the stolen money had been located, Gonzalez left the cell and walked to a desk on which the personal belongings of all the prisoners had been placed. As he was leafing through the three passports, Gonzalez pushed Aguiluz and Novoa aside, hurriedly stuffed a piece of paper in his mouth and began eating the paper. Novoa and Aguiluz then grabbed Gonzalez and attempted to extract the paper from his mouth. Daly came over to assist and proceeded to kick Gonzalez in the throat in an attempt to remove the paper. In the midst of this commotion, Elena Risso, who had not been placed in a cell, went to the desk and began to tear up the papers lying on it (Tr. 471-72).

After order had been restored, Aguiluz overheard Gonzalez tell the other defendant in Spanish that: "The cargo is safe and we are not going to suffer any loss." (Tr. 473).

B. The Seizure

Although Gonzalez had swallowed the piece of paper, Aguiluz and Novoa, after examining the remaining papers and documents, determined by a process of elimination that the paper he had swallowed, which they had previously examined several times, contained an address—210 W. 19th Street, Apartment 4-F. While Novoa remained in the squad room with the prisoners, Aguiluz and Daly proceeded to 210 W. 19th Street, arriving there in the early morning hours of April 15, 1970 (Tr. 473-75).

Using one of the keys found among the prisoners' belongings, they opened the door of Apartment 4-F and searched the apartment. The search revealed some empty suitcases, various passports and two heavily locked closets.

Aguiluz then telephoned Novoa at the Sixth Precinct and asked him to contact Detective John Kid, an expert in picking locks, to assist in opening the closed doors. When Detective Kid arrived at about 7:00 A.M., he opened the first of the two doors with relative ease and found an empty suitcase with a residue of white powder and a scale. The second door proved more difficult to open. When Kid finally managed to unlock the door, he found the closet filled with brick-shaped packages of heroin and cocaine in kilo and half kilo sizes wrapped in South American newspapers. Kid then awakened Aguiluz who had been dozing on the living room couch and gave him the news of the seizure. Together with Daly, Aguiluz removed the packages from the closet, placed them on the floor and began unwrapping some of them. A field test of the contents of one package indicated narcotics of a high purity (Tr. 477-79, 768-772).*

While they were removing the packages of narcotics from the closet, Daly told Aguiluz, outside of Kid's presence, that he wanted to keep five packages of narcotics for "flaking"

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* Approximately 100 kilos of suspected narcotics were removed by the police from the apartment and vouchered with the Property Clerk's Office of the Police Department. Thus the total seizure, including the 5 kilos retained by Novoa, Daly and Aguiluz, amounted to 105 kilograms of narcotics. Nevertheless, the seizure became known as the "100 Kilo Case". The original laboratory analysis revealed the drugs to be heroin and cocaine (Tr. 788-93, 841; GX 5). As a result of an investigation into the removal of narcotics from the Property Clerk's Office, a re-analysis was performed in December, 1972 which established that all the heroin and cocaine had been removed from the bags and that a starch substance (flour) had been substituted in their place (Tr. 1073-76; GX 11).

purposes, *i.e.*, to be planted on a person so as to create grounds for his arrest. Aguiluz agreed with the proposal, and Daly placed three kilos of heroin and two kilos of cocaine in a small suitcase found in the apartment which he then carried downstairs and placed in the trunk of his car (Tr. 480, 482). At about this time Novoa arrived at the apartment. Daly and Aguiluz informed Novoa that they had taken five kilos of the seized narcotics. Novoa said that was "fine" (Tr. 483-84).

Aguiluz left the apartment at approximately 8:45 A.M. and went to the Manhattan District Attorney's Office to obtain a search warrant for the apartment. After the search warrant was issued, he returned to the apartment where he met Novoa and Daly as well as Sergeant Gabriel Stefania and Lieutenant John Egan of SIU as they waited for superior officers and the press to arrive (Tr. 484-85).

Later in the day Novoa, Aguiluz and Daly returned to the Sixth Precinct where the processing of the prisoners continued. During the afternoon Novoa told Aguiluz that Stefania had insisted that $1200 in cash seized from the four prisoners be split among the police officers. Aguiluz testified that he received $240 from Novoa as his share of the money (Tr. 488-89).

C. The Sale of Five Kilos of Narcotics

Approximately a week after the arrest, Aguiluz told Novoa and Daly that he wanted to keep custody of the valise containing the five kilos of narcotics. Daly handed the valise to Aguiluz in Novoa's presence on an unidentified street in Manhattan, and Aguiluz placed it in the trunk of his car (Tr. 490-91).

Within a month or two, Novoa, Aguiluz and Daly decided to sell the narcotics. Aguiluz suggested that his brother-in-law Salvador Boutureira be used as an inter-

mediary to sell the drugs. Daly and Novoa, both of whom had previously known Boutureira, agreed (Tr. 493).

Shortly thereafter, Aguiluz delivered the valise containing the five kilos to Boutureira's apartment located at 14 Bedford Street in Greenwich Village in Manhattan. Boutureira told Aguiluz that he would try to find a buyer for the drugs. Boutureira then met with Frank Ramos, owner of the Cafe Madrid located on 14th Street near Seventh Avenue in Manhattan, and asked Ramos if he could arrange to sell the drugs. Ramos said he would need some samples of the narcotics which Boutureira thereafter delivered. Boutureira and Ramos agreed on a purchase price of $12,500 per kilo of heroin and $9,500 per kilo of cocaine from which Ramos would receive $500 per kilo sold as a commission (Tr. 6-13, 494-96).

(i) The Two Sales to Demetrios Papadakis

After receiving the samples from Boutureira, Ramos met with Demetrios Papadakis, told him that there were drugs available for sale and gave him one of the heroin samples. Papadakis later reported to Ramos that he was interested in purchasing the narcotics if they matched the quality of the sample (Tr. 324-325).

Ramos then arranged a meeting at the Cafe Madrid where the transaction was to be consummated. Papadakis arrived with defendant Elissa Possas, but did not have the full amount of the purchase price. When Boutureira appeared, Ramos informed him that the buyers did not have the money. Boutureira left the Cafe Madrid and reported what had happened to Aguiluz, Novoa and Daly. Another meeting was scheduled for the next day (Tr. 326-27).

The following day Boutureira removed the valise containing the five kilos from his apartment, transported it in his car to the Club Espana, a social club on 14th Street to which Boutureira belonged, and hid the package underneath

some wood in the basement of the building. Boutureira advised Aguiluz, Novoa and Daly that he planned to conceal the kilo of heroin to be sold underneath a board in a nearby parking lot on 13th Street and Eighth Avenue where it would be picked up. After hiding the package beneath the board, Boutureira met with Aguiluz, Novoa and Daly in a park across the street from the parking lot where they told him that they would keep the parking lot under surveillance. Boutureira then left for the Cafe Madrid (Tr. 12-15).

In the meantime Papadakis and Possas had returned to the Cafe Madrid with a paper bag containing $12,500 which they handed to Ramos who took it to the rear of the restaurant. When Boutureira arrived, Ramos told him that he had the money and pointed out Papadakis and Possas as the purchasers. Upon viewing the money inside the paper bag, Boutureira informed Ramos where the kilo of heroin was secreted. Ramos, in turn, relayed the information to Papadakis, who then signalled to a man standing outside the Cafe Madrid. The man, wearing a black leather jacket, entered the restaurant, spoke briefly with Papadakis and left (Tr. 15-16, 327-28).

Aguiluz, Novoa and Daly observed the man wearing the black leather jacket leave the Cafe Madrid. They then proceeded by car to a building opposite the parking lot where they positioned themselves in the lobby. Within a short time they observed the man in the black leather jacket riding on a motorcycle. He entered the parking lot, found the package of narcotics and examined its contents momentarily. He then left the parking lot with the package. When he reached the street, a taxi pulled up into which he threw the package. The taxi drove off at high speed followed by the motorcycle (Tr. 500-01).

Minutes later Elissa Possas received a telephone call at the Cafe Madrid after which she told Ramos that everything was all right. After she and Papadakis left, Ramos

gave the money to Boutureira. The money was counted and Ramos was paid $500. Boutureira then stuffed the $12,000 under his shirt and left the restaurant (Tr. 16, 328).

Boutureira drove a short distance in his car on 14th Street where he met Aguiluz, Novoa and Daly. Riding alone in his car, he followed the three detectives to the Hotel Taft where a room was secured. Inside the room, Boutureira removed the money from beneath his shirt, placed it on the bed and, together with the others, counted it. Upon Novoa's suggestion that the money be divided equally, each of them took $3,000 and left the hotel (Tr. 17-18, 501-04).

Several days later Papadakis called Ramos and told him that he wanted to buy another kilo of heroin of the same quality as the kilo he had purchased. Ramos, in turn, contacted Boutureira who thereupon went to the Club Espana where he removed a second kilo of heroin from the cache, which he then placed in a subway locker located at 14th Street and Eighth Avenue (Tr. 19-20).

Boutureira then went to the Cafe Madrid where he observed Papadakis and Possas sitting at a table. When Ramos informed Boutureira that they did not have the money, Boutureira said that they could not have the package. He then left the Cafe Madrid and told Aguiluz, Novoa and Daly what had occurred (Tr. 20).

The following day, after placing more money in the subway locker, Boutureira returned to the Cafe Madrid where he found Ramos, Papadakis and Possas. In the rear of the restaurant Ramos showed Boutureira the package containing the money and explained that while there was $1,000 missing, he would accept responsibility for making it up after the narcotics were delivered. Boutureira then told Ramos where the kilo of heroin was hidden and gave him the key to the subway locker. Ramos relayed the information to Papadakis and handed him the key. Papa-

dakis then left the restaurant. A short time later, Possas received a telephone call from him and reported to Ramos that everything was all right. After she left the Cafe Madrid, Ramos handed the money to Boutureira, who, in turn, gave Ramos $500. Boutureira then took the money to an East Side apartment where he hid it beneath a bed (Tr. 20-21, 328-29).

The following day Papadakis telephoned Ramos and complained that the second kilo of heroin he had received had been "cut" and did not match the quality of the first package. Ramos then contacted Boutureira and persuaded him to meet with Papadakis at the restaurant to discuss the problem. Papadakis arrived with another unidentified man, and when Boutureira appeared, Ramos introduced them to him. The unidentified man said that he was Papadakis' "boss". Boutureira told them that he had not touched the package and said that it had to be the same as the first kilo. The unidentified man then accused Papadakis of cutting the heroin. He also gave Boutureira his telephone number and said that if he obtained any other drugs, he should call him directly (Tr. 23-24, 330-31).

Thereafter Boutureira met Papadakis on numerous occasions at the Cafe Madrid where Papadakis repeatedly asked to buy more drugs without using Ramos as an intermediary. Boutureira, however, refused the offer (Tr. 24).

(ii) The Sale to Joaquin Nieves

Within a week or ten days after the second sale of heroin to Papadakis, Ramos arranged for the sale of the third kilo of heroin to defendant Joaquin Nieves, a frequent patron of the Cafe Madrid. On the night of the sale, Boutureira walked into the Cafe Madrid where Ramos told him that all the arrangements had been made for the sale and that the buyer was present with money. Boutureira protested about the lack of advance notice. After unsuccessfully

attempting to contact Aguiluz, Boutureira decided to go ahead with the transaction.

Upon obtaining the third kilo of heroin from the basement of the Club Espana, he placed it underneath the seat of his car which he parked in front of the Cafe Madrid. After leaving open the door on the driver's side of the car, he entered the Cafe Madrid and informed Ramos where the drug was located. Ramos conveyed the information to Nieves who immediately left the restaurant carrying a newspaper under his arm. Boutureira observed Nieves proceed to the car, open the door and remove the package which he placed inside the folded newspaper. Upon re-entering the Cafe Madrid, Nieves handed the newspaper containing the package of heroin to one of three girls who had been sitting with him. The girl then left. Upon learning from Nieves that the drugs had been received, Ramos handed Boutureira $12,000 which Nieves had previously given to him. Ramos, of course, received his customary $500 commission (Tr. 24-27, 331-34).

After picking up the $12,000 from the previous sale to Papadakis and consolidating it with the money paid by Nieves, Boutureira divided the total amount of $24,000 into four equal shares, and through Aguiluz arranged a meeting to deliver the proceeds of the sales. Boutureira thereafter met with Novoa, Daly and Aguiluz and gave each of them an envelope containing $6,000 (Tr. 26-27, 507-511).

(iii) The Two Sales to Lorenzo Cancio

Shortly after the sale to Nieves, Ramos introduced Boutureira to co-conspirator Lorenzo Cancio, a convicted narcotics dealer then recently released from prison, who also patronized the Cafe Madrid. After Cancio told Ramos that he was interested in re-entering the narcotics business, Ramos introduced him to Boutureira. Cancio told Boutureira that he wanted to buy the cocaine but lacked the

money to purchase it. Boutureira eventually agreed to sell him a half kilo of cocaine on consignment. Boutureira delivered it to Ramos who, in turn, gave it to Cancio. Later Cancio gave Ramos $4,500 which he turned over to Boutureira. Ramos received $250 as his commission on the sale (Tr. 28-29, 334-36).

Thereafter, Boutureira dealt directly with Cancio and agreed to sell him another half kilo of cocaine. Boutureira, however, gave him a kilo by mistake. Upon realizing the error, Boutureira attempted to locate Cancio without success. When he again met Cancio at the Cafe Madrid, Cancio told him that he had given Cancio a kilo of cocaine. Boutureira then decided to give him the remaining half kilo of cocaine to sell. Over a period of time Cancio gave Boutureira a total of $18,000, including the $4,500 received from Ramos, for the two kilos of cocaine. After Novoa and Aguiluz returned from vacation, Boutureira gave each of them $4,500 and gave Aguiluz an additional $4,500 for Daly as their share of the proceeds from the sales to Cancio (Tr. 28-33).

D. The Theft of $5,000

Shortly after Aguiluz returned from his vacation on July 6, 1970, he met Novoa and Daly at SIU headquarters in Manhattan. Novoa informed him that while he had been away, Novoa and Daly had located Elena Risso's apartment in Brooklyn where they found $5,000 which they had kept for themselves. Novoa then gave Aguiluz his one-third share of the money (Tr. 512-13, 681).

E. The Negotiations to "Fix" the "100 Kilo Case"

Gonzalez, Mulas and Risso, three of the suspects arrested on April 14, 1970, retained co-conspirator Michael Santangelo, Esq. to represent them (GX 7, 9, 10). Santangelo promptly proceeded to arrange a "fix". Through a bail bondsman named Nicholas DeStefano, Santangelo contacted SIU Detective Nicholas Lamattina. At a meeting near the

Criminal Court Building at 100 Centre Street in Manhattan, Santangelo asked Lamattina if he would contact the officers handling the "100 Kilo Case" "to see if anything could be done". Lamattina said he would speak to the detectives and would get back to Santangelo (Tr. 816-18).

Lamattina then contacted Detective Daly and arranged a meeting which took place in an automobile on South Street near the First Precinct stationhouse. Novoa and Aguiluz accompanied Daly. When Lamattina told them that Santangelo wanted to know whether the case could be fixed, Novoa said that it could be arranged, but demanded that Santangelo first pay them $5,000, the balance of a bribe which he owed them on an earlier case (*infra*, p. 21). Novoa also mentioned that it would cost $150,000 to fix the "100 Kilo Case". Lamattina said he would get back to them (Tr. 520-21, 818-20).

Within a day or two, Lamattina met Santangelo on Baxter Street in Manhattan and informed him that the $5,000 balance on the earlier case had to be paid before anything could be done. Santangelo replied that he would take care of it and would get in touch with Lamattina. A couple of days later, they again met on Baxter Street where Santangelo handed Lamattina an envelope which he said contained the balance owed. Lamattina replied that he would deliver the envelope and would later advise Santangelo about what could be done concerning the "100 Kilo Case". When Lamattina delivered the money,* he again asked whether the three detectives were still interested in fixing the "100 kilo case". They said they could take care of it, but demanded a bribe of $125,000. When Lamattina remarked that they wanted a lot of money, they replied that

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* The $5,000 was later divided in equal shares by Novoa, Daly and Aguiluz at a meeting underneath the viaduct of the FDR Drive near SIU headquarters in Manhattan (Tr. 523).

the defendants had the money and that the risk involved was high (Tr. 819-24).

The three detectives asked Lamattina about how he was going to be paid for arranging the "fix". He responded by telling them not to worry about it, adding, however, that he would accept anything that they might wish to do for him. They then informed him that the charges against two of the defendants were expected to be dismissed at their next appearance in court. One of the defendants had a bank account containing $24,000, the passbook for which was being held by his lawyer, Ben Gold. They suggested that it would be agreeable to them if Lamattina arranged a deal for himself with Gold concerning this defendant. Lamattina thanked them and said that he would get in touch with them again (Tr. 824-25; GX 6).

Within a day or two, Lamattina again met Santangelo and reported that Novoa, Daly and Aguiluz wanted $125,000. Santangelo angrily rejected the demand as too high, stating that he only had $300,000, $200,000 of which had been put up as bail money. Since he planned to charge $50,000 for his own fee, Santangelo said that: "If there is anything in it for anybody it's 50,000" (Tr. 826-27).

Santangelo also told Lamattina that he had witnesses who would testify that the detectives had followed the defendants to New Jersey where they beat them up and then took them to New York before arresting them (Tr. 827).

A day or two after this meeting with Santangelo, Lamattina again met Novoa, Daly and Aguiluz and reported what Santangelo had told him, including the allegations about the illegal arrests in New Jersey. He added that he thought they should not get involved. Novoa replied that they had nothing to worry about (Tr. 828-29).

Several days later Lamattina happened to meet Santangelo who informed him that he had been fired by his

clients and was no longer handling the case (DX F, pp. 31-32).*

3. The Federal Investigation

In December, 1969 the United States Customs Service commenced an investigation into the importation of narcotics from South America. The investigation was initiated as a result of the arrest by SIU detectives of several South Americans at the Hotel McAlpin in Manhattan on December 6, 1969. On December 7, 1969 Albert W. Seeley, a special agent with the Customs Service, spoke with two of the detectives involved in that arrest who said that one of the defendants named Lopez had arrived at JFK airport from South America shortly before his arrest on December 6. At the time of his arrest he had in his possession two wine jugs containing narcotics in a concealed compartment (Tr. 1008-10).

On the following day, December 8, 1969, two Customs agents arrested one Arsenio Arraya Murchio at JFK Airport after he had disembarked from a flight arriving from South America. He had in his possession two wine jugs containing about six kilos of heroin (Tr. 1010, 1013).

At his arraignment in the Eastern District of New York, Murchio was represented by Michael Santangelo. Later Seeley discovered that Santangelo also represented the defendants arrested at the Hotel McAlpin (Tr. 1013).

On April 16, 1970, Seeley through the news media learned of the arrests and seizure in the "100 Kilo Case". He sub-

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* Although Novoa, Daly and Aguiluz never received any bribe payment from Santangelo on the "100 Kilo Case", Lamattina managed to persuade Mr. Gold to pay him $1,200 on the representation that he knew the police officers handling the case who could arrange to have his clients "cut loose". Gold handed Lamattina a package containing $1,200 in a coffee shop on White Street a day or two after the case against his client was dismissed (DX F, pp. 20-23).

sequently learned that Murchio was a member of the same smuggling organization to which the four suspects arrested on April 15, 1970 belonged (Tr. 1014-15).

Seeley immediately began an investigation of these four suspects. Two Customs agents were dispatched to SIU and discussed the case with Lieutenant Egan and the detectives who had made the arrests and seizure. After obtaining copies of the passports found on the four suspects from Detective Aguiluz, Seeley discovered that two of them, Gonzalez and Risso, had entered the United States under false names. He then contacted the Immigration and Naturalization Service and learned that INS had previously developed a file on Risso (Tr. 1015-17, 1042, 1052).

In late April or May, 1970, Seeley went to the Manhattan District Attorney's Office to discuss with Assistant District Attorney Fitzgerald the arrests made by the police on April 15, 1970 and the investigations being conducted by Customs and INS. His specific mission was to prevent the defendants from being released on bail before the federal agencies could establish their true identities. Novoa and Aguiluz, as well as Fitzgerald, were present during this meeting (Tr. 1018-19).

On May 10, 1970 Risso was released on $100,000 bail posted by Santangelo. Five days later, Seeley received federal arrest warrants issued in Miami for Risso and Gonzalez. The arrest warrant for Risso could not be executed, however, because she jumped bail and fled to South America. On May 19th, Gonzalez, who was about to be released on bail on the state charges, was arrested by Seeley on a Customs charge. Gonzalez was subsequently indicted in both the Southern and Eastern Districts on immigration charges (Tr. 1020-21).

Santangelo also represented Gonzalez on the federal charges pending in the Southern District of New York.

In late May, 1970, Seeley was present at a meeting with Santangelo, Assistant District Attorney Fitzgerald and William Tendy, then Chief of the Narcotics Unit in the United States Attorney's Office for the Southern District of New York. At the meeting, Santangelo alleged that his client had been illegally arrested by the police in New Jersey and indicated that Gonzalez could identify the location. When Tendy asked whether Gonzalez would be willing to go with an agent to point out the location, Santangelo replied that he would be agreeable provided he could accompany his client (Tr. 1021-22).

As a result, Seeley and another agent took Gonzalez and Santangelo by car to New Jersey. When they reached the Jersey side of the George Washington Bridge, Gonzalez identified the Toll Gate Motel in Fort Lee as the place where he and his companions had been stopped by the New York police (Tr. 1022-23).

Upon reaching the motel, Seeley inquired about the incident. He was told by the owner that he would have to speak to the night manager and to return at 6:00 p.m. When he returned to his car, he observed Santangelo walk across the courtyard of the motel and speak to a chambermaid. The motel owner appeared and complained about Santangelo speaking to his employee without his permission. Minutes after the owner re-entered the motel, two detectives from the Fort Lee Police Department arrived on the scene. After Seeley identified himself and explained the purpose of his visit, the Fort Lee police officers told him about the earlier incident and that a report concerning it had been submitted to the local Chief of Police. Seeley and the others then returned to New York where Seeley informed Tendy about what he had learned on the visit. Seeley returned to Fort Lee on May 25 where he obtained a copy of the report from the Fort Lee Police Department (Tr. 1023-24; DX I).

On May 28, Seeley arrested Rodriguez on charges of using false documents to enter the United States. Rodriguez eventually agreed to cooperate with the federal authorities (Tr. 1024-25).

As a result of the federal investigation conducted by Customs, an indictment was returned in the Eastern District of New York on January 7, 1971 charging Gonzalez,* Risso and four others with conspiracy to import narcotics into the United States (Tr. 1025).

Arsenio Arraya Murchio, the courier arrested by Customs on December 8, 1970, also agreed to cooperate with the federal authorities after he had pleaded guilty and had been sentenced on April 10, 1970. Murchio revealed that at one time he had served as a houseboy and cook for Elena Risso and that the six kilos of heroin in his possession at the time of his arrest had been destined for her. Indeed, she had been waiting for him at the airport when he was arrested (Tr. 1028-30).

Seeley testified that in April and May, 1970 he did not know that Elena Risso had an apartment in Brooklyn nor did he know that Daly had seized $5,000 from the apartment. He also, of course, had not been advised that five kilos of narcotics had been illegally taken from the batch of drugs seized on April 15, 1970 (Tr. 1031-32).

4. Other Conspiratorial Acts

A. Mendez and Castillo

On October 22, 1969 Detectives Novoa, Aguiluz, Sottile, and Fox arrested two suspected narcotics dealers named Mendez and Castillo at the former's residence in Brooklyn. The arresting officers found a large quantity of narcotics, and Detective Fox seized approximately $15,000 in cash from the two suspects. The four detectives later shared $11,000 of this money (Tr. 525, 686, 885-86).

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* Gonzalez escaped from federal custody on January 25, 1971 and is still a fugitive.

B. The Hotel Taft Case

On March 31, 1970 Novoa, Aguiluz and Daly were conducting surveillance of the Cafe Madrid when they observed Raoul Leguizamon, a suspected narcotics violator, leave the restaurant and enter a taxi which took him to the Hotel Taft. After ascertaining the room in which Leguizamon was staying, the three detectives secured an adjoining room and Aguiluz and Daly proceeded to install an illegal wiretap on the telephone in Leguizamon's room (Tr. 611-612). As a result of information obtained from the wiretap, Leguizamon and a companion, Alberto Diaz, were arrested that day in the lobby of the hotel. A search of his room revealed a large quantity of narcotics which were seized. They also seized $40,000, which was later divided among Novoa, Daly, Aguiluz, Egan and Stefania (Tr. 525-26), and confiscated the passports of Leguizamon and Diaz which contained false United States visas (DX B).

Leguizamon and Diaz retained Michael Santangelo, Esq. as their attorney. Within a week or two after the arrest, Detective Lamattina met with Novoa, Daly and Aguiluz, stated that he was acting on behalf of Santangelo and asked whether the case could be fixed. Novoa said that payment of a $25,000 bribe would be required (Tr. 518-19, 682). Sometime after April 15, 1970 Novoa told Aguiluz that he had turned over to Lamattina the passports and personal papers belonging to Leguizamon and Diaz (Tr. 520). It was in connection with this case that Santangelo paid $5,000 to Novoa, Daly and Aguiluz (*supra*, p. 15).

C. The Airport Case

On May 11, 1970 a suspected Latin-American drug dealer named Banderas was arrested at JFK airport. Banderas had in his possession $210,000 which Daly seized. While Banderas and two other suspects were being booked at the 18th Precinct Station House in Manhattan, Daly, Novoa and Aguiluz, together with Egan, Stefania and another officer named Wooster, agreed to keep for themselves all the money except $2,900, which was later vouchered as evidence (Tr. 526, 927-930).

D. Lopez

In late June, 1970 a suspected narcotics dealer named Lopez was arrested in possession of $40,000. Novoa, Daly and Aguiluz kept the money and divided it among themselves (Tr. 527-28).

E. Olate and Quintanilla

On September 11, 1970 Aguiluz and Sottile arrested two suspected narcotics dealers named Olate and Quintanilla in Manhattan. Aguiluz seized $7,000 from one of the defendants which was later divided at the 18th Precinct among Novoa, Daly, Aguiluz and Sottile (Tr. 528-29, 887-88).

The Defense Case

1. Novoa

Novoa testified in his own behalf and denied participating in any wrongdoing (*e.g.*, Tr. 1188-89, 1202-1210). He testified extensively about the arrest at the Hotel Taft and the arrests in the "100 Kilo Case," but denied taking any money, accepting bribes, participating in bribe discussions, stealing narcotics, selling narcotics or committing any wrongful act whatsoever.

Cross-examination established that on April 30, 1970, approximately one month after the Leguizamon arrest from which he received $10,000, Novoa purchased a Buick automobile for $4,000, paying $2,000 in cash as a down payment (Tr. 1254-56; GX. 20).

On July 16, 1970, at about the time that Boutureira testified he had given Novoa $4,500 in cash as his share of the proceeds of the sale of the two kilos of cocaine to Lorenzo Cancio, a teller's check in the sum of $5,000 payable to Joseph Novoa was purchased for cash at the South Brooklyn Savings Bank (GX 17) and was deposited by Novoa in his account at the Hamilton Federal Savings

Bank (Tr. 1260; GX 19). On August 10, 1970 Novoa deposited another $5,000 into a savings account at the Manufacturers Hanover Trust Company which he had opened on May 29, 1970 (Tr. 1263; GX. 15, 16). On August 4, 1970 Novoa made a down payment of $3,250 on a house which he later purchased (Tr. 1272). Before being confronted with these large cash expenditures, Novoa testified that his total income during 1970 was $13,389 and that apart from a few hundred dollars in gifts for his children, he had not received any gifts (Tr. 1252-54). After being confronted with these expenditures, he changed his testimony and said that he had received a gift of $12,000 from his mother-in-law over a period of time and had borrowed $5,000 from another unidentified member of his wife's family (Tr. 1272, 1281).* Neither relative took the witness stand to corroborate this claim.**

2. Papadakis and Nieves

Papadakis did not present any evidence in his own defense. Nieves recalled Ramos and Aguiluz to the stand in a further effort to impeach their testimony (Tr. 1327-1339, 1392-1395).

The Government's Rebuttal Case

Assistant United States Attorney Joseph Jaffe, Chief of the Official Corruption Unit, testified that at no time during his interview with Novoa on March 8, 1974 did Novoa ask to take a lie detector test or to have the results published on the front page of the New York Daily News (Tr. 1342).

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* His expenditures in 1970 totalled more than $26,000, twice the amount of his reported income (Tr. 1267 *et seq.*; GX 13).

** Novoa's wife's brief testimony did not refer to the alleged gifts from her family (Tr. 1103-1115).

ARGUMENT

POINT I

The evidence of crimes not specified in the indictment was properly admitted against Novoa.

Novoa contends that he was denied a fair trial because he claims that evidence of crimes not charged in the indictment was introduced at trial. The argument is without merit. All of the challenged evidence, which, except in one instance, was introduced without objection, was relevant and probative with respect to the conspiracy charges alleged in Counts One and Four or was otherwise admissible.

Of the six instances in the record specified by Novoa in support of his claim that evidence of other crimes was improperly admitted,* half relate to the testimony concerning the Hotel McAlpin case.

The McAlpin case was first mentioned briefly by Aguiluz at the conclusion of his direct examination when he testified that $23,900 had been seized at the Hotel McAlpin on December 6, 1969, of which $3,900 was vouchered as evidence and $20,000 was shared by him and other police officers (Tr. 530).

Seeley also referred to the McAlpin case at the beginning of his testimony. He testified that after learning through the news media that four South Americans had been arrested at the McAlpin Hotel by New York City Police officers, he went on Sunday, December 7, 1969 to 100 Centre Street where the defendants were to be arraigned and there spoke with Detectives Joseph Nunziatta and Raymond Viera about the arrest. They informed him that a few hours before the arrest, on December 6, 1969, one of the defendants,

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* Novoa Br. at 26, citing [1]69a, 175a, 218a, 287a, 288a, 291a.

Mersais Lopez, had arrived at JFK airport and that at the time of his arrest he had in his possession two wine jugs containing a quantity of narcotics (Tr. 1009-1010).

The very brief testimony concerning the McAlpin case was not offered as a prior similar offense committed by Novoa, since there was never any suggestion that Novoa was in any way involved.

The incident at the Hotel McAlpin was highly relevant, however, because it sparked the commencement of the investigation conducted by the Bureau of Customs concerning narcotics smuggling from South America. Proof of that investigation was an important ingredient in establishing the offense charged in Count One which alleged a conspiracy having as one of its purposes the obstruction of that very investigation.

Similar considerations support the admissibility of Seeley's testimony about the arrest of Arsenio Arraya Murchio by Customs agents on December 8, 1969 at JFK airport as he attempted to smuggle into this country two wine jugs containing six kilos of heroin (291a). Murchio's arrest was a highly significant development in the Custom's investigation. It established a link to the seizure of narcotics at the Hotel McAlpin because it revealed the use of a common *modus operandi* to smuggle narcotics from South America, *i.e.*, wine jugs having concealed compartments and carried by passengers on flights arriving from South America.

Murchio, as the investigation later disclosed, was a member of the same South American smuggling group to which three of the defendants in the "100 Kilo Case" belonged, and the heroin in his possession at the time of his arrest was in fact destined for delivery to Elena Risso, one of those defendants.

Murchio's arrest revealed a further common link to the Hotel McAlpin case when Michael Santangelo appeared to represent him. Santangelo's representation of (a) the defendants arrested at the Hotel McAlpin, (b) Murchio and (c) three of the South American defendants arrested in the "100 Kilo Case" was more than coincidental.* It provided an experienced investigator like Seeley with an important clue in discerning the connection between three ostensibly separate incidents. And, as the investigation later revealed, all these people were involved in single conspiracy to import narcotics from South America which ultimately resulted in the filing of a federal narcotics conspiracy indictment in January, 1971. Furthermore, Santangelo himself became a key figure in the negotiations to fix the "100 Kilo Case", which was a central part of the Government's proof under Count One.

In sum, the evidence relating to the incident at the Hotel McAlpin and to the arrest of Murchio was essential in explaining the investigation which Novoa was charged with obstructing and hence was plainly admissible. See *United States* v. *Bradwell*, 388 F.2d 619, 620-21 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States* v. *Santana*, Dkt. 74-1080 (2d Cir., August 19, 1974), slip op. 5299 at 5311.** Since the evidence showed that Novoa did not share in the money stolen in the McAlpin case and was not in any way involved with Murchio in the smuggling of narcotics, he could not possibly have been prejudiced by the admission of this evidence.

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* Santangelo also represented one of the South American defendants arrested at the Hotel Taft on March 31, 1970.

** Aguiluz' testimony about his *own* participation in the McAlpin case was independently admissible under the settled rule that the Government is "entitled on direct examination of its witnesses to elicit information that could be damaging to the witness' credibility . . . ." *United States* v. *Rochman*, 463 F.2d 488, 490 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972); *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969).

Lamattina's testimony concerning the case in which he pleaded guilty (218a) and his other acts of misconduct (219a, 220a) is admissible for the same reason.

While Novoa did not share in the money seized at the Hotel McAlpin, he did so in other incidents proved at trial (*supra*, pp. 20-22). In each instance the money constituted evidence of the commission of a narcotics offense which, instead of being retained and vouchered in the required manner, was shared by Novoa, Daly, Aguiluz and other SIU officers who, on occasion, were involved. Precisely the same kind of conduct occurred in the "100 Kilo Case" on two occasions: first, when Novoa, Daly, Aguiluz and Stefania divided among themselves the $1,200 found on the four suspects on the night of their arrests and second, when Novoa, Daly and Aguiluz shared $5,000 subsequently discovered in the Brooklyn apartment of Elena Risso.

The evidence concerning these other acts was admissible because it related to "the purpose, scope and existence" of a conspiracy on the part of a loose-knit group of SIU officers, including Novoa, Daly and Aguiluz, to obstruct justice, hinder the investigation and prosecution of narcotics violators and suppress and conceal evidence of such violations, "of which the very conspiracy specifically charged in Count One was a part." *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973); *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir. 1974).

The various episodes concerning thefts of money seized as evidence in the course of narcotics arrests by Novoa and his partners during the 11 month period from October, 1969 to September, 1970* reflected "a pattern of conduct of which the crime charged [was] a part," *United States* v. *Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971), and constituted proof of a "system of criminal activity" in which Novoa participated. *United States* v. *Deaton*, 381 F.2d 114, 118 (2d Cir. 1967). The

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* Two of the incidents (the Mendez and Castillo and Hotel Taft cases) occurred before the period specified in the indictment, which covered April 14, 1970 to July, 1970. Two others (the Airport and Lopez cases) occurred during that period. The last (the Olate and Quintanilla cases) took place shortly thereafter.

testimony concerning these incidents was relevant to show that the trio was "continuing along the same line" in withholding and suppressing evidence as specifically alleged in Counts One and Four. *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

It is important to emphasize that Count Four, which charged a conspiracy to violate 21 U.S.C. §§ 173 and 174, alleged that the "means" by which the defendants accomplished the objectives of that conspiracy included the seizure of narcotics by Novoa and others, "under the guise of their official capacity as police officers" and the illegal retention of five kilos of heroin from the larger quantity seized. The seizure of money from arrested narcotics dealers and its illegal retention by these same police officers is, of course, similar in nature and probative of a pattern of conduct and a common scheme or means to commit the offense alleged in Count Four.

Even if the evidence of the five incidents involving Novoa and the others are not deemed within the scope of the conspiracies charged, it was unquestionably probative of the existence of these conspiracies and Novoa's participation therein, see *United States* v. *Nathan*, 476 F.2d 456, 459-460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Super*, 492 F.2d 319, 323 (2d Cir. 1974), and was otherwise admissible as part of their "background". *United States* v. *Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

With respect to the events in the Hotel Taft case, it is clear, however, that the evidence was "part and parcel of the same transaction which constituted the offense charged." *United States* v. *Deaton*, *supra*, 381 F.2d at 118; *United States* v. *Bozza*, 365 F.2d 206, 212-214 (2d Cir. 1966). The arrest of Leguizamon and Diaz at the Hotel Taft on March 31, 1970 resulted in the theft of $40,000 and a subsequent

bribe offer made by Santangelo and conveyed by Lamattina to Novoa, Daly and Aguiluz who accepted it. The payment of that bribe offer became a critical factor in the negotiations two months later between Santangelo and the trio to fix the "100 Kilo Case." To present the facts concerning the Hotel Taft case, including Aguiluz' own participation in the theft of $40,000 and in the negotiations to fix the case, without mentioning Novoa's crucial role in both phases, would have given the jury a highly distorted and "truncated version of what was claimed to have occurred." *United States* v. *Bozza, supra,* 365 F.2d at 213.

The law is well established in this circuit that evidence of other crimes is admissible for any relevant purpose except when offered solely to prove the criminal character or disposition of the defendant. *E.g., United States* v. *Brettholz,* 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied* as *Santiago* v. *United States,* 415 U.S. 976 (1974); *United States* v. *Vario,* 484 F.2d 1052, 1056 (2d Cir. 1973), *cert. denied,* 414 U.S. 1129 (1974); *United States* v. *Warren,* 453 F.2d 738, 745 (2d Cir.), *cert. denied,* 406 U.S. 944 (1972); *United States* v. *Deaton, supra; United States* v. *Bozza, supra.* In conspiracy prosecutions, such as this case, it is accepted doctrine that "the Government has considerable leeway in offering evidence of other offenses." *United States* v. *Bonanno, supra,* 467 F.2d at 17; *United States* v. *Parker,* 469 F.2d 884, 894 (10th Cir. 1972). In assessing whether the evidence of other crimes has been confined within permissible limits, its probative force must be balanced against its possible prejudicial effect. In this case the balance weighed heavily in favor of admitting the evidence, as Judge Wyatt properly ruled (Tr. 837-840).

Here, as in *United States* v. *Bozza, supra,* "the danger that the jury would 'probably be roused by the evidence to overmastering hostility' was minimal". 365 F.2d at 214. The "temperature generated" by the narration of the theft and subsequent sale of five kilos of heroin and cocaine for $54,000, the negotiations to sell the "100 Kilo Case," in-

volving one of the largest narcotics seizures in history, for $125,000 and the theft of $6,200 from the defendants in that case "was not likely to be significantly augmented" by evidence that money had been stolen on other occasions *Id.*

It is well worth repeating that Novoa never once objected at trial to the evidence concerning the thefts of money which he now claims was devastatingly prejudicial, nor did he ever move to strike that evidence* The failure to take such action precludes review here. *United States* v. *Santana, supra,* slip op. at 5310; *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966). Furthermore, the failure of the trial court to give a cautionary instruction concerning this evidence cannot be raised now, since Novoa did not request such an instruction below and did not except to the charge on this ground. Fed. R. Crim. P. 30; *United States* v. *Bozza, supra,* 365 F.2d at 214.

In any event, in light of the overwhelming proof against Novoa, involving the directly incriminating testimony of three accomplices (Aguiluz, Boutureira and Lamattina) and the corroborating testimony of a fourth (Ramos), any error was harmless beyond a reasonable doubt. *United States* v. *Bonnano, supra,* 467 F.2d at 17.

POINT II

Novoa was properly convicted of the conspiracy charged in Count One.

1. Multiplicity

Novoa argues that his conviction under Count One is invalid because the conspiracy charged included as one of its objects the violation of 21 U.S.C. §§ 173 and 174, which also was the object of the conspiracy under Count Four. Since the evidence allegedly established a single, overall conspiracy, Novoa claims it was therefore improper to

* Novoa's only objection was to Seeley's testimony concerning the seizure of narcotics at the Hotel McAlpin and the arrest of Murchio (Tr. 1012, 1032).

include two conspiracy counts in the indictment, which he asserts had an adverse psychological impact on the jury.

The record, however, offers no support for his contention. Count One alleged a conspiracy under 18 U.S.C. § 371 having four objects or purposes: (1) to defraud the United States and its departments and agencies by obstructing and hindering the Department of Justice, the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs in investigating and prosecuting violations of the federal narcotics laws; (2) to violate 21 U.S.C. §§ 173 and 174; (3) to violate 18 U.S.C. § 3; and (4) to violate 18 U.S.C. § 1510. Count Three alleged a conspiracy under 21 U.S.C. §§ 173 and 174 to violate those statutes.

It is beyond dispute that the conspiracy described in Count One was far broader in scope than the one alleged in Count Four. Furthermore, there were only three common members of both conspiracies (Novoa, Daly and Aguiluz). Egan, Stefania, Sottile, Fox, Lamattina and Santangelo were named by the Government as co-conspirators under Count One only; Ramos, Papadakis, Nieves, Possas, Boutureira and Cancio were named under Count Three only (Tr. 123, 535).

The evidence in this case plainly provided a basis for concluding that separate conspiracies existed even though there were some common co-conspirators and some of the same acts were committed in furtherance of both conspiracies. Here, as in *United States* v. *McKnight*, 253 F.2d 817, 819 (2d Cir. 1958), the two conspiracy counts were "permissible to meet the different interpretations which might be placed on the evidence by the jury." See also *United States* v. *Northeast Texas Chapter*, 181 F.2d 30, 33 (5th Cir. 1950).

But even if Novoa were correct in claiming that only one conspiracy was proven, it was still permissible for the

Government to "cast the indictment in several counts whether the body of facts upon which the indictment [was] based [gave] rise to only one criminal offense or to more than one." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225 (1952). As the Court of Appeals held in *Duke* v. *United States*, 255 F.2d 721, 729 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958):

> "If there were a conspiracy which continued over a long period of time and different persons were involved in different phases, it would not be improper to charge those in one phase with one conspiracy and use a separate count to charge all those in a different phase as co-conspirators in such different phases."

Whether viewed as separate conspiracies or as different "phases" of a single conspiracy, it is indisputable that Novoa was a key figure in both. Since his sentences on all counts were concurrent, his claim of prejudice is without substance. See *Stephens* v. *United States*, 347 F.2d 722, 724 (5th Cir.), *cert. denied*, 382 U.S. 932 (1965).

Finally, the claim of multiplicity was not raised below and therefore may not be reviewed on this appeal.

2. Sufficiency

The law is well established that where a conspiracy alleges multiple objects or purposes, as Count One does, conviction under that count is proper if *any one* of the illegal objects or purposes is sufficiently proved. *United States* v. *Mack*, 112 F.2d 290, 291 (2d Cir. 1940); *United States* v. *Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973); *United States* v. *Tanner*, 471 F.2d 128, 140 (7th Cir. 1972); *United States* v. *Goodwin*, 455 F.2d 710, 714 (10th Cir.), *cert. denied*, 409 U.S. 859 (1972).

Novoa does not attempt to challenge the sufficiency of the evidence with respect to three of the four objects or purposes of the conspiracy charged in Count One, *i.e.*, (1)

to defraud the United States by obstructing or hindering the Bureau of Customs in investigating and prosecuting violations of the federal narcotics laws; (2) to violate 21 U.S.C. §§ 173 and 174; and (3) to violate 18 U.S.C. § 3. Since the proof unquestionably established an agreement to achieve these unlawful purposes, there is more than a sufficient basis upon which to affirm the conviction under Count One.

Moreover, Novoa's arguments with respect to the fourth object of the conspiracy cannot withstand scrutiny. His first claim is that there was no evidence that he "knew of any impending investigation or intended to impede a federal investigation" and therefore could not properly be found guilty of conspiracy to violate 18 U.S.C. § 1510. (Novoa Br. at 36).

This contention wholly ignores Seeley's testimony that two of his agents discussed the "100 Kilo Case" with Lieutenant Egan and the detectives who made the arrests and seizure. Seeley himself spoke with Novoa and Aguiluz about the federal investigation at the office of Assistant District Attorney Fitzgerald (Tr. 1015-19, 1042, 1052; see also Aguiluz' testimony at Tr. 489-90).

However, the clearest evidence of Novoa's knowledge of the pending federal investigation is revealed by his own testimony at trial.* On direct examination Novoa confirmed that after he left the apartment on April 15, 1970, he returned to the 6th Precinct where he met the federal agents and turned over to them the passports seized from the arrested suspects (Tr. 1181, 1193). He also testified extensively about the later meeting with Seeley at Fitzgerald's office.

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* Novoa's testimony may be properly considered in determining whether the evidence was sufficient. *United States* v. *Tramunti*, Dkt. No. 74-1398 (2d Cir., July 12, 1974), Slip. Op. at 4813; *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

According to Novoa, Seeley told Fitzgerald that members of SIU had not been cooperating with Customs in its investigation. He further said that he had built federal cases against the people arrested at the Hotel McAlpin and that if SIU officers had provided assistance, those people might not have been able to jump bail and flee, as in fact they had done. Seeley also spoke about the "100 Kilo Case," lamenting the fact that Elena Risso had jumped bail because he (Seeley) had compiled a case against her based upon a passport violation (Tr. 1190-91).

Novoa testified that he became incensed at the implication that he was somehow responsible for the flight of Risso and the others and told Seeley that if he had any evidence of wrongdoing, he should present it to a grand jury (Tr. 1194-95). Novoa further claimed that he was later warned by both Santangelo and Lamattina that he himself had become a target of Seeley's investigation (Tr. 1197).

Novoa's argument that there was no showing that he "knew that the federal jurisdiction was involved or that the federal jurisdiction was being exercised for the authorities" (Novoa Br. at 35) evaporates completely in the face of this evidence. Furthermore, the evidence also demonstrates that Novoa intended to obstruct the federal investigation by acts which 18 U.S.C. § 1510 proscribes.

The narcotics and money illegally retained by Novoa and his two partners in the "100 Kilo Case" constituted evidence of federal criminal offenses which was concealed from Seeley and the other agents conducting the Customs investigation.

Section 1510 of Title 18 was enacted by Congress in 1967, in large measure, to remedy the lack of protection then afforded under federal law to witnesses and informants in investigations concerning organized crime and racketeering. U.S. Code Cong. and Admin. News, 90th Cong., 1st Sess., Vol. 1 at 1761 (1967). However, the statute by its terms is not limited to "organized crime and racketeering", even assuming that this term is not sufficiently broad enough to cover the criminal activity proved in this case. "The language of the statute proscribes, in sufficiently clear terms, the obstruction of an investigation into a criminal matter by certain designated unlawful means." *United States* v. *Lippman*, 492 F.2d 314, 316 (6th Cir. 1974).

"Misrepresentation" is one of the prohibited means. As used in the act, the term "misrepresentation" means "the actual *procurement by a party of another party's* misrepresentation or *silence to a Federal investigator* . . . even though such procurement was not achieved by any misrepresentation". U.S. Code Cong. and Admin. News, 90th Cong., 1st Sess., Vol. 1 at 1762 (1967) (emphasis added).

In the instant case, the agreement among Novoa, Aguiluz and Daly to retain certain evidence they had seized, *i.e.*, the money and the narcotics, contemplated that each of them agreed to refrain from disclosing the existence of this evidence and the circumstances under which they obtained it to the Customs agents, whom they knew were conducting an investigation in which knowledge of and access to this evidence would, at the very least, be highly useful. Such an agreement, in other words, amounted to the "procurement" by each of the other's "silence". There can be no doubt that "this strangulation by silence" of evidence material to the Customs investigation constituted "misrepresentation" and was forbidden by Section 1510. *Id.* at 1761.

In addition to "misrepresentation", the statute prohibits the employment of "bribery" as a means of obstructing a

criminal investigation. Bribery, of course, is an offense committed by the person accepting the bribe as well as the person offering it. See 18 U.S.C. § 201(c) and (e) (pertaining to public officials and witnesses). Since acceptance of Santangelo's offer would have undoubtedly affected any information or testimony that Novoa, Daly and Aguiluz might have provided in connection with the Customs investigation as well as in the state proceeding, Novoa's involvement in the discussions and meetings with Lamattina and in the receipt of the $5,000 bribe payment in connection with the Hotel Taft case (payment of which was a prerequisite for fixing the "100 Kilo Case") was ample further evidence of his participation in a conspiracy to violate Section 1510.

This analysis is supported by the Sixth Circuit's decision in *United States* v. *Lippman, supra,* which affirmed convictions for conspiracy to violate Section 1510 and substantive violation of that statute. There the conspiracy to violate Section 1510 involved an agreement among Zuber and Staffel, who had been members of a marijuana smuggling ring, and Lippman, their attorney, pursuant to which Zuber agreed not to reveal Staffel's participation in the drug operation in exchange for money and other consideration.

Similarly, in the instant case, the evidence permitted the inference that Aguiluz agreed with Novoa and Daly not to reveal their participation in the illegal retention of seized narcotics and money.*

Lippman implicitly rejects the Fifth Circuit's holding in *United States* v. *Cameron,* 460 F.2d 1394, 1401 (5th Cir.

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* Count One itself alleged that:

"It was further part of said conspiracy that the defendants and their co-conspirators would conceal the existence of the conspiracy and would take steps to prevent disclosure of their activities." (5a)

1972) that Section 1510 cannot be applied to "communications between alleged accomplices to the commission of federal offenses." It is submitted that *Cameron*, which has been overruled on other grounds,* also is erroneous with respect to its unduly restrictive construction of Section 1510 and should not be followed here.

In attacking the validity of his conviction under Count One, Novoa also argues that it is impossible, as a matter of law, to conspire to violate 18 U.S.C. § 3, since the substantive offense under Section 3 itself allegedly requires the participation of more than one person. Even if Novoa were correct in his reading of Section 3, which is doubtful, the argument ignores the rule, applicable here, that:

> ". . . as long as the conspiratorial concert of action and the substantive offense underlying it are not coterminous and fewer participants are required for the commission of the substantive offense than are named as joining in a conspiracy to commit it, there is no infirmity in the conspiracy indictment." *United States* v. *Becker*, 461 F.2d 230, 234 (2d Cir. 1972).

Accord: *United States* v. *Benter*, 457 F.2d 1174, 1178 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972); *United States* v. *Smolin*, 182 F.2d 782, 786 (2d Cir. 1950).

Finally, Novoa contends that his conviction under Count One violates his privilege against self-incrimination. The argument is frivolous. The gist of the charge was not Novoa's failure to report that he had committed a criminal offense after having illegally retained the money. Rather, it was an agreement, among other things, to refrain from disclosing evidence of crimes committed by others, *i.e.*, the

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* See *Barnes* v. *United States*, 412 U.S. 837 (1973); *United States* v. *Roberts*, 483 F.2d 226 (5th Cir. 1973); *United States* v. *Howard*, 483 F.2d 229 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973).

South American defendants, which had been discovered by Novoa and his partners in the course of their official duties as law enforcement officers and which they were obligated to safeguard as public property for use in future proceedings. *Marchetti* v. *United States,* 390 U.S. 39 (1969) is therefore wholly inapposite.

POINT III

There was ample evidence from which the jury could find that Novoa knew that the cocaine had been illegally imported.

Novoa contends that the evidence was insufficient to establish that he knew that the two kilos of cocaine that were the subject matter of Counts 5, 9 and 10 had been illegally imported. There is no merit to the argument, since there was ample evidence from which the jury could have found actual knowledge of importation. Furthermore, the quantity of cocaine involved was sufficiently large so that the jury could find such knowledge based upon the statutory presumption contained in 21 U.S.C. § 174.

The 105 kilos of heroin and cocaine discovered on April 15, 1970 were wrapped in newspapers from a South American country (Tr. 770, 781). In fact, a photograph of the narcotics in their original newspaper wrappings taken on the day of the seizure, (after Daly had removed the five kilos) was admitted in evidence (GX 3). All of the police officers connected with the case, including Novoa, Daly and Aguiluz, are depicted in the photograph standing behind four open suitcases filled with the newspaper wrapped packages. Contrary to Novoa's suggestion, there is nothing in the record to suggest that only the heroin was wrapped in these newspapers. Nor is there any evidence to support his speculation that the South American newspapers were purchased in New York City and that the cocaine was produced in this country.

Furthermore, the four suspects whom Novoa and his partners had arrested on April 15, 1970 were all South Americans. They had in their possession South American passports, two of which contained false visas. This was ample circumstantial proof, which Novoa was fully aware of, that the 105 kilos of narcotics, of which 62 kilos were cocaine, were not of domestic origin and had been smuggled into the United States. Since evidence was introduced by Novoa that both heroin and cocaine are imported into the United States (Tr. 1038), the jury was fully justified in concluding that under all the circumstances, an experienced narcotics officer like Novoa knew full well that the cocaine involved here had been illegally imported.

Even assuming *arguendo* that there was insufficient evidence of actual knowledge of importation on Novoa's part, there can be no question that the two kilos of cocaine stolen by Novoa, Daly and Aguiluz and later sold to Lorenzo Cancio were a large enough quantity of the drug to permit the jury to infer the requisite knowledge based upon the statutory presumption under Section 174. *United States* v. *Gonzalez*, 442 F.2d 698, 705, 709 (2d Cir.) (en banc), *cert. denied*, 404 U.S. 845 (1971); *United States* v. *Nathan*, 476 F.2d 456, 461 n. 15 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Vargas*, 443 F.2d 901, 903 (2d Cir. 1971).

POINT IV

Neither Papadakis nor Novoa was entitled to a severance.

1. Joinder under Fed. R. Crim. P. 8(b).

Papadakis claims that Counts Four through Ten, in which concededly he was properly named as a defendant with Novoa and others, were improperly joined with Count One, which named Novoa and Daly as the defendants in the

conspiracy charged therein. It is argued that Count One included acts in furtherance of the conspiracy wholly unrelated to Papadakis and to the remainder of the indictment and that therefore joinder was barred under Fed. R. Crim. P. 8(b). The argument totally lacks merit.

Rule 8(b) provides:

> "(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Joinder of defendants under Rule 8(b) is permissible where the defendants' acts were part of series of transactions constituting an offense or offenses. It is not necessary that all defendants be charged in the same count. "Participation" in the "same series" does not require proof of "participation" in each transaction of the series. *Haggard* v. *United States,* 369 F.2d 968, 973 (8th Cir. 1966), *cert. denied as Alley* v. *United States,* 386 U.S. 1023 (1967); *United States* v. *Scott,* 413 F.2d 932, 934-35 (7th Cir. 1969), *cert. denied,* 396 U.S. 1006 (1970). Separate trials are not required even though there may be evidence admissible against one defendant but not against the others. *Caton* v. *United States,* 407 F.2d 367, 372 (8th Cir.), *cert. denied,* 395 U.S. 984 (1969); *Haggard* v. *United States, supra,* 369 F.2d at 973; *United States* v. *Hoffa,* 349 F.2d 20, 43 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1966).

The governing principle is aptly summarized in *United States* v. *Roselli,* 432 F.2d 879, 899 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971) as follows:

> "It is implicit in the language of Rule 8(b) that so long as all defendants participate in a series of acts

> constituting an offense or offenses, the offenses and defendants may be joined even though not all the defendants participated in every act constituting each joined offense. Rule 8(b)'s 'goal of maximum trial convenience consistent with minimum prejudice' is best served by permitting initial joinder of charges against multiple defendants whenever the common activity constitutes a substantial portion of the proof of the joined charges" (footnotes omitted).

Here the charges against Papadakis on their face were substantially interrelated with the conspiracy alleged in Count One. Furthermore, as the proof at trial disclosed, the "common activity" connecting Novoa and Papadakis which culminated in the sale of two kilos of heroin to the latter constituted a "substantial portion of the proof of the joined charges." *Id.* Joinder of Count One with the other charges in the indictment was wholly proper.* See *United States* v. *Marshall*, 458 F.2d 446, 451 (2d Cir. 1972); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *Berger*, 433 F.2d 680, 685 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971).

Moreover, having failed to raise the issue of misjoinder by motion before trial, Papadakis waived the objection. Fed. R. Crim. P. 12(b)(2); *Cupo* v. *United States*, 359 F.2d 990, 993 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1013 (1967); *United States* v. *Gougis*, 374 F.2d 758, 764 (7th Cir. 1967).

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* The propriety of the original joinder of Novoa and Papadakis is not altered by the dismissal of conspiracy count (Count Four) as to Papadakis at the conclusion of the case. *United States* v. *Schaeffer*, 266 F.2d 435 (2d Cir. 1959), *aff'd*, 362 U.S. 511 (1960); *United States* v. *Elgisser*, 334 F.2d 103 (2d Cir.), *cert. denied as Gladstein* v. *United States*, 379 U.S. 879 (1964); *Stern* v. *United States*, 409 F.2d 819 (1969); *United States* v. *Catino*, 403 F.2d 491 (2d Cir. 1968), *cert. denied* as *Pagano* v. *United States*, 394 U.S. 1003 (1969). Furthermore, Judge Wyatt subsequently expressed serious doubt about whether he had acted correctly in dismissing Count Four as to Papadakis (Tr. 1731-32).

2. Severance under Fed. R. Crim. P. 14.

Papadakis' claim to severance under Rule 14 rests on his contention that voluminous prejudicial evidence was introduced at trial having no relation to him, the effect of which could not be cured by the trial court's repeated protective instructions.* There was, however, no abuse of discretion in denying his application for a separate trial.

The essence of Papadakis' complaint is that the "overwhelming mass of damning evidence" against Novoa** must have infected the jury's verdict against him. But it is perfectly clear that the jury was sufficiently able to separate the evidence against each defendant to acquit Nieves completely, acquit Papadakis on Count Six, convict him on Count Seven and convict Novoa on Counts One and Four through Ten. Thus, it cannot be said that the jury did not follow the trial judge's instructions or carefully consider the evidence admitted against Papadakis.*** *United States* v. *Jordan*, 399 F.2d 610, 615 (2d Cir.), *cert. denied*, 393 U.S. 1005 (1968); see *United States* v. *Marshall*, *supra*, 458 F.2d at 452.

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* See *e.g.* Tr. 815, 883, 1003-04, 1009, 1682.

** Papadakis' claim of the "overwhelming mass" of evidence against Novoa alone is highly exaggerated. Of the 11 witnesses called by the Government during its case in chief, 7 presented evidence relevant to the charges against Papadakis. Only four witnesses (Lamattina, Sottile, Stefania and Seeley) testified solely as to Novoa.

*** The jury began deliberating on May 29, (Tr. 1624). On May 30, at 6:35 P.M. the foreman announced a partial verdict: Novoa—guilty on Count One; Papadakis—not guilty on Count Six; Nieves—not guilty on Count Eight (Tr. 1664-67). Following another day of deliberation, the jury, on June 3, found Papadakis guilty on Count Seven (Tr. 1725-28). Three hours later, the jury found Novoa guilty on Counts Four through Ten (Tr. 1739-40).

Further evidence of the care with which the jury evaluated the evidence against Papadakis may be discerned from the portions of the testimony which they requested be read to them (Tr. 1686-87, 1714).

The dismissal of the conspiracy count (Count Four) against Papadakis did not render inadmissible the hearsay statements concerning the acquisition, distribution and sale of the five kilos since the evidence showed a joint venture to sell the drugs to Papadakis and others. *United States* v. *Annunziato,* 293 F.2d 373, 378-381 (2d Cir.), *cert. denied,* 368 U.S. 919 (1961); *United States* v. *Pugliese,* 153 F.2d 497, 500 (2d Cir. 1945). Similarly, the acts of the other joint criminal venturers also were admissible even absent the conspiracy count. *United States* v. *Jacobs,* 475 F.2d 270, 281 n. 25 (2d Cir.), *cert. denied* as *Thaler* v. *United States,* 414 U.S. 821 (1973); *United States* v. *Granello,* 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied,* 386 U.S. 1019 (1967).

Under these principles, even at a separate trial against Papadakis on the two substantive counts alone, Aguiluz could have testified as to how the two kilos of heroin had been obtained, the arrangements made to sell them and the circumstances under which the proceeds from their sale were divided. And since the Government would have been entitled to adduce any discrediting information about Aguiluz on direct examination, much of the allegedly prejudicial evidence introduced below would likewise be admissible.

A trial court's refusal to grant a severance will rarely be disturbed on review. *United States* v. *Fantuzzi,* 463 F.2d 683, 687 (2d Cir. 1972); *United States* v. *Jenkins,* 496 F.2d 57, 67-68 (2d Cir. 1974). On the record before this Court, it cannot be said that the trial court abused its broad discretion in denying Papadakis' request for a separate trial.

Novoa's argument in support of his claim to a severance is frivolous. The alleged prejudice arose from Judge Wyatt's refusal to permit Novoa to prove that he had once arrested Nieves on a narcotics charge and that Nieves was eventually convicted. Such evidence, however, would have been totally irrelevant. The proof showed that Novoa never knew that Nieves was the buyer of the third kilo of heroin.

Thus, the arrest of Nieves was not in any way inconsistent with the evidence presented by the Government. Furthermore, it is difficult to see how this evidence would establish that Novoa was not corrupt, since the Government never claimed that Novoa illegally seized narcotics or money in every arrest that he made. Accordingly, the offer of proof and the request for a separate trial were properly denied.

POINT V

The trial court's modified "Allen" charge was proper.

Novoa argues that the modified "Allen" charge * given to the jury when it reported a deadlock on Counts 4 through 10 as to Novoa was coercive because Judge Wyatt stated that: "The trial has involved the time, effort, and money of both the defendant Novoa and the government" (Tr. 1706). It is claimed that in "these days of high taxation and governmental expenses", the remark was "extremely prejudicial" (Novoa Br. at 41).

This Court has repeatedly encouraged the use of the *Allen* charge in appropriate circumstances. *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973); *United States* v. *Jennings*, 471 F.2d 1310, 1313-14 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973). The remark challenged here is the very reason for giving the supplemental instruction. *United States* v. *Rao*, 394 F.2d 354, 355 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968); *United States* v. *Hynes*, 424 F.2d 754, 757 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970); *United States* v. *Bowles*, 428 F.2d 592, 596 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970). Its inclusion in the instruction was wholly proper. See *United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir. 1973) (approving the same charge by Judge Wyatt; Devitt and Blackmar, Federal Jury Practice and

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* See *Allen* v. *United States*, 164 U.S. 492 (1896).

Instructions, Vol. 1, § 17.18 at 333 (2d ed. 1970). Finally, since Novoa did not except to the supplemental instruction on the ground asserted here, he cannot raise the matter on this appeal. *United States* v. *Bowles, supra,* 428 F.2d at 396-97 n. 13; Fed. R. Crim. P. 30.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

LAWRENCE S. FELD,
Assistant United States Attorney,
Of Counsel.

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) ss.:
COUNTY OF NEW YORK)

LAWRENCE S. FELD being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of September, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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277 Broadway
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Lawrence S. Feld

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